CONSTITUTIONAL LAW IN 1918–1919. II

THE CONSTITUTIONAL DECISIONS OF THE SUPREME COURT OF THE UNITED STATES IN THE OCTOBER TERM, 1918

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VI. TAXATION

Several of the cases already considered under the commerce clause involved further questions under the Fourteenth Amendment. Georgia's misuse of the mileage ratio in applying the unit rule to the taxation of wandering cars was found so arbitrary as to violate the requirement of due process.[75] The minority insisted that "the case presents no question of taxing a foreign corporation with respect to personal property that never has come within the borders of the state." This was not specifically denied by the majority who seem to base their decision on excessive valuation of property within the jurisdiction rather than on taxation of property outside the jurisdiction. Yet in substance the case is one of taxing extra-state values though not extra-state tangible objects.

Missouri's excessive fee for certificates authorizing the issue of bonds secured by railroad property within the state, which was held an unconstitutional regulation of interstate commerce,[76] was alleged by complainant to be a violation of the Fourteenth Amendment as well. The opinion of the court did not pass on the due-process question, but the cases cited under the commerce clause relied also on the Fourteenth Amendment. The St. Louis tax on manufacturers, measured by the amounts received for the sale of goods produced within the city, wherever such sales occurred, was held to be a tax on manufacturing within the city and not on property or business transactions without the state and therefore not obnoxious to the Fourteenth Amendment.[77]

[75] Union Tank Line v. Wright, (1919) 249 U. S. 275, 39 Sup. Ct. 276, 13 *American Political Science Review* 614.

[76] Union Pacific R. Co. v. Public Service Commission, (1918) 248 U. S. 67, 39 Sup. Ct. 24, 13 *American Political Science Review* 611.

[77] American Mfg. Co. v. St. Louis, (1919) 250 U. S. 459, 39 Sup. Ct. 522, 13 *American Political Science Review* 612.

In Mackay Telegraph & Cable Co. v. Little Rock[78] a company which was subjected to a license tax on poles located on a private right of way thought it was denied the equal protection of the laws because some of its competitors had not been similarly hit. But the court thought that for all that appeared the alleged discrimination might be fortuitous or temporary, and denied relief in the absence of offers "to show an arbitrary and intentionally unfair discrimination in the administration of the ordinance" or that the circumstances of the several companies and their telegraph lines were so much alike as to render any discrimination in the application of the pole tax equivalent to a denial of the equal protection of the laws."

The due-process claim advanced in Wells Fargo & Co. v. Nevada[79] was founded on an allegation that the assessment complained of was made without giving the taxpayer notice and an opportunity to be heard. It appeared, however, that under the Nevada procedure payment of the tax could not be enforced until after a judgment obtained in judicial proceedings "wherein process issues and an opportunity is afforded for a full hearing." In accordance with established precedents, this was held to satisfy the requirements of due process.

Absence of notice and hearing was also complained of unsuccessfully in three cases upholding special assessments. All were declared by the court to be governed by the principle that "where the Legislature fixes by law the area of a sewer district or the property which is to be assessed, no advance notice to the property owner of such legislative action is necessary in order to constitute due process of law." In each case the municipality was found to possess legislative authority in the premises so that the cases came within the general rule. This conclusiveness of the legislative authority was limited to the determination of the district benefited by the improvement. It was recognized that "the question of distributing or apportioning the burden of the cost among the particular property owners is another matter." Complaints directed against the apportionment require separate notice.

Withnell v. Ruecking Construction Co.[80] involved the St. Louis combination of foot-frontage and area rule which in an earlier case[81] had

[78] (1919) 250 U. S. 94, 39 Sup. Ct. 428, 13 *American Political Science Review* 613.

[79] (1918) 248 U. S. 165, 39 Sup. Ct. 62, 13 *American Political Science Review* 613.

[80] (1919) 249 U. S. 63, 39 Sup. Ct. 200.

[81] Gast Realty Co. v. Schneider Granite Co., (1916) 240 U. S. 55, 36 Sup. Ct. 254, 12 *American Political Science Review* 451. See the later case between the same parties in Schneider Granite Co. v. Gast Realty Co., (1917) 245 U. S. 288, 38 Sup. Ct. 125, 13 *American Political Science Review* 70.

been held inapplicable to the particular situation before the court. The earlier case had, however, sustained the one-fourth part of the assessment levied by the foot-frontage rule, and inasmuch as the evidence showed that the assessment in the principal case reached by applying the combination rule was less than what it would have been if the total cost had been apportioned according to frontage, the Supreme Court found itself unable to say that there had been any abuse of power. The court declared that where the assessment is in accordance with a legislative rule, "no previous notice or preliminary hearing as to the nature and extent of benefits" is necessary, and that an attack on a method so prescribed "can only succeed if it has produced results . . . . palpably arbitrary or grossly unreasonable."

Similar principles were repeated in Hancock v. Muskogee[82] where the cost of a sewer was assessed according to the area of the abutting lots, Mr. Justice Pitney declaring that it is settled that "whether the entire amount or a part only of the cost of a local improvement shall be imposed as a special tax upon the property benefited, and whether the tax shall be distributed upon a consideration of the particular benefit to particular lots or apportioned according to their frontage upon the streets, their values, or their area, is a matter of legislative discretion, subject, of course, to judicial relief in cases of actual abuse of power or of substantial error in executing it, neither of which is here asserted."

The objection pressed most strongly in Mt. St. Mary's Cemetery Association v. Mullins[83] was that a cemetery was not benefited by a sewer and therefore could not be included in a sewer district. The association had litigated the issue unsuccessfully in the state courts, and had been there given the hearings deemed sufficient to satisfy the procedural requirements of due process. The only benefit referred to by the Supreme Court in sustaining the assessment was the fact that the sewer served to carry away surface water. It was remarked also that there was nothing to show that "the cemetery would not have been benefited as to sanitation as a result of the construction of the sewers." Without discussion it was asserted that the case was not within the principle of an earlier decision[84] which excluded high land from a drainage district on the ground that it could not be benefited by the enterprise. The association contended further that the assessment

[82] (1919) 250 U. S. 454, 39 Sup. Ct. 528.

[83] (1919) 248 U. S. 501, 39 Sup. Ct. 173.

[84] Myles Salt Co. v. Drainage District, (1916) 239 U. S. 478, 36 Sup. Ct. 204, 12 *American Political Science Review* 451.

should be reduced because half of its tract had been conveyed for burial lots. The state court had held that only an easement and not the fee had been conveyed and the Supreme Court held that the qualified interest remaining in the association was sufficient to support the assessment. The objection that complainant had been denied the equal protection of the laws because not placed in a district by itself, as some other cemeteries were, was rejected on the ground that "the record fails to show similarity of situation and conditions."

The remaining decision on the subject of state taxation had to do with an Alabama statute which imposed an occupation tax on persons and corporations engaged in construction work within the state, and made the tax on those whose chief office was without the state four times as large as that on those whose chief office was within the state. In reply to the claim that this discriminated against citizens of other states, the state court had said that such citizens might have their chief office within the state and that citizens of the state might have their chief office without the state. A similar position, it will be recalled, had been taken by the Supreme Court during the 1918 term in sustaining a statute restricting licenses for insurance brokers to residents of the state.[85] In Chalker v. Birmingham & N. W. Ry. Co.,[86] however, the case now under consideration, Mr. Justice McReynolds said that, as the chief office of an individual is commonly in the state of which he is a citizen, the statute would practically discriminate against citizens of other states. The decision declaring the tax invalid was predicated on the privileges and immunities clause of article 4, section 2, and not on the due-process clause of the Fourteenth Amendment, so the case does not shake the rule that permits discrimination against foreign corporations not engaged in interstate commerce or in work for the national government. There are indications, however. that the rule is no longer regarded with favor, and it would not be surprising if before long the Supreme Court materially modifies it.

In view of the increasing number of state income taxes, the interpretation of the federal income tax law reached in De Ganay v. Lederer[87] is important for state as well as national taxation. In this case the Supreme Court answered in the affirmative the following question certified by the Circuit Court of Appeals:

[85] La Tourette v. McMaster, (1919) 248 U. S. 465, 39 Sup. Ct. 160, 13 *American Political Science Review* 627.

[86] (1919) 249 U. S. 522, 39 Sup. Ct. 366. See 28 *Yale Law Journal* 824.

[87] (1919) 250 U. S. 376, 39 Sup. Ct. 524.

"If an alien non-resident owns stock, bonds, and mortgages secured upon property in the United States or payable by persons or corporations there domiciled, and if the income therefrom is collected for and remitted to such non-resident by an agent domiciled in the United States, and if the agent has physical possession of the certificates of stock, the bonds and the mortgages, is such income subject to an income tax under the Act of October 3, 1913?"

After reviewing the facts of the case, including the power possessed by the agent to sell, assign, or transfer the securities and reinvest the proceeds of sales, Mr. Justice Day declared: "It is difficult to conceive how property could be more completely localized in the United States. There can be no question of the power of Congress to tax the income from such securities." The case on its facts does not go beyond those in which intangibles have been regarded as having what is called a "business situs" in the place where an agent does an investment business for his principal, and therefore warrants no inference that the Supreme Court means to allow a state to tax income paid to non-residents except where it can tax to him the sources of that income. The opinion, too, is careful to mention "the authority given to the local agent" as an important element in the case, but it may be worth noting that there is no declaration that such element is indispensable.

The so-called Harrison Narcotic Drug Act, passed by Congress on December 17, 1914, came before the court in United States v. Doremus[88] and was sustained by a vote of five to four. The act required all dispensers of drugs to register with the collector of internal revenue and to pay a tax of one dollar a year. Doremus had registered and paid the tax but he had violated the further provision forbidding the sale of drugs except in pursuance of a written order on a form issued by the commissioner of internal revenue. Under the statute the person filling the order was required to file it for the inspection of treasury agents. There were exceptions in favor of physicians, but Doremus, though a physician, did not bring himself within the exception. He contended that the provisions which he violated had no fiscal purpose but were purely police measures and as such were beyond the powers delegated to Congress and an encroachment on the reserved powers of the states. The district court and Chief Justice White together with Justices McKenna, Van Devanter and McReynolds agreed with him; but

[88] (1919) 240 U. S. 86, 39 Sup. Ct. 214. See 4 *Cornell Law Quarterly* 196, 32 *Harvard Law Review* 846, and 28 *Yale Law Journal* 599. For a note on the decision in the court below see 18 *Columbia Law Review* 459.

the majority, speaking through Mr. Justice Day, found themselves unable to say that the provisions in question had no relation to the raising of revenue. They thought that they tended to keep the traffic above board and subject to inspection, and "to diminish the opportunity of unauthorized persons to obtain drugs and sell them clandestinely without paying the tax imposed by the federal law." The test applied appeared from one portion of the opinion to be whether the provisions had some or no relation to a fiscal object, and not whether the relation if any was a reasonably close one. But earlier it was said that "if the legislation enacted has some reasonable relation to the exercise of the taxing authority conferred by the Constitution, it cannot be invalidated because of the supposed motives which induced it." While the case does not involve prohibitory taxation and therefore does not furnish a sure index of what the present court will say as to the federal excise on manufacturing goods in factories in which children are employed, it may be significant that the opinion referred with approval to the case[89] sanctioning the supposedly prohibitive tax on the manufacture of artificially colored oleomargarine.

VII. EMINENT DOMAIN

One who contended that the clause of the Fifth Amendment reading "nor shall private property be taken for public use, without just compensation" entitled him to compensation from a state for damages from flooding due to the elevation of the spillway of a state-maintained dam learned from Palmer v. Ohio[90] that the Fifth Amendment is not a shield against state action.

Portsmouth Harbor Land & Hotel Co. v. United States[91] held that no "taking" within the Fifth Amendment was committed by firing projectiles across complainant's land.

In United Railroads v. San Francisco,[92] the court was unable to say from the evidence before it that the damage caused a street railroad by having a new municipal road cross its tracks was sufficient to be regarded as a taking of its property rather than an incidental injury to which its franchise was subject, since the new road had not been constructed. The bill to enjoin the new construction was dismissed

[89] McCray v. United States, (1904) 195 U. S. 27, 24 Sup. Ct. 769.
[90] (1918) 248 U. S. 32, 39 Sup. Ct. 16.
[91] (1919) 250 U. S. 1, 39 Sup. Ct. 399.
[92] (1919) 249 U. S. 517, 39 Sup. Ct. 361.

without prejudice, however, so that the company might be entitled to show later that the damage was sufficiently great as to constitute a taking which must be paid for under the due-process clause of the Fourteenth Amendment. This disposition of the case indicates that Mr. Palmer, who unsuccessfully adduced the Fifth Amendment against Ohio, might have had better success with the Fourteenth Amendment.

Louisville & N. R. Co. v. Western Union Telegraph Co.[93] held that the description of the right of way to be taken by a telegraph company along a railroad was sufficiently definite, although the location of the poles was not specified, where only one line of poles was to be allowed, and they were required to be set up so as not to interfere with the operations of the railroad, and to be subject to the stipulations set forth in the petition, one of which contained an agreement on the part of the telegraph company to change the line at its expense to correspond to any change in the location of the railroad tracks. "The description," remarked Mr. Justice Holmes, "has been held to satisfy the requirements of State law and it would be extravagant to say that the Fourteenth Amendment made it bad." The same case held that no constitutional rights were infringed because the hearing on the question whether there was a right to condemn was given in a separate equity proceeding rather than in the suit in which damages were assessed or because the hearing on other matters was postponed until it should clearly appear that the telegraph company was making the wrongful use of the line which it was charged to contemplate making.[94]

VIII. RETROACTIVE CIVIL LEGISLATION

The familiar principle that the police power for the protection of health, morals and safety cannot be bargained away was applied to dismiss objections raised under the obligation-of-contracts clause in three cases already considered which sustained ordinances prohibiting the storage of oil,[95] requiring the removal of railroad tracks on the

[93] (1919) 250 U. S. 363, 39 Sup. Ct. 513.

[94] In Orr v. Allen, (1918) 248 U. S. 35, 39 Sup. Ct. 23, the court gave no consideration to a complaint against a statute creating drainage districts with power of eminent domain, since it was clear that the objections urged were founded on an assumed construction of the statute which the state court had expressly decided it would not bear.

[95] Pierce Oil Corporation v. New Hope, (1919) 248 U. S. 498, 39 Sup. Ct. 172, 13 *American Political Science Review* 624

public street[96] and regulating the size and location of billboards.[97] The contracts relied on in the billboard case were those between the company and advertisers. In the oil case the alleged contract was a previous removal to the present location at the request of the city. Such a request, said Mr. Justice Holmes, "does not import a contract not to legislate if the public welfare should require it, and such a contract if made would have no effect." In the railroad case it was assumed that the tracks were located under a franchise and that the right granted became a vested property right, but it was insisted that the right was held subject to the power of the city to enforce reasonable regulations for the public safety, and the regulation in question was found to be reasonable. It was implied that the degree of reasonableness required to sustain a police measure might be greater when vested rights were affected than when they were not.

In several cases the contracts claimed and relied on were held not to possess the quality imputed to them by the objectors to changes in the *status quo ante*. Northern Pacific Ry. Co. v. Puget Sound & W. H. Ry. Co.[98] found nothing but a rule of present policy in a statute allowing companies later formed to cross the tracks of existing companies but requiring the newcomer to pay the cost of crossing. A later statute dividing the expenses between the crossed and the crossing road was therefore held applicable to a company whose tracks were laid after the former statute was passed and before the change in policy.

In United Railroads v. San Francisco[99] a statute, in force at the time of the grant of complainant's franchise, prohibiting two street railroads from occupying or using the same street or track for more than five blocks, was thought to be merely a declaration of present legislative policy and a limitation for the time being on municipal officers, but not a contract by the state, nor an authority to the municipalities to contract, against a larger use of the street. This, however, was not the ground of the decision in the case, since the complaint was against a use of the streets by a municipal railroad, and to this it was answered that the court had previously decided that a "covenant by a city not to grant to any other person or corporation a privilege

[96] Denver & R. G. R. Co. v. Denver, (1919) 250 U. S. 241, 39 Sup. Ct. 450, 13 *American Political Science Review* 618, 630.

[97] St. Louis Poster Advertising Co. v. St. Louis, (1919) 249 U. S. 269, 39 Sup. Ct. 274, 13 *American Political Science Review* 624.

[98] (1919) 250 U. S. 332, 39 Sup. Ct. 474.

[99] (1919) 249 U. S. 517, 39 Sup. Ct. 361, *supra*, footnote 92.

similar to that granted to the covenantee does not restrict the city from itself exercising similar power."

Darling v. Newport News[100] held that a lease by a state of land under water to be used for oyster beds does not import any contract not to permit a municipality to discharge sewage into the water over the beds. It was doubted whether the state would have power to make such a contract and thus tie its hands in a matter so important for the public welfare. In Pawhushka v. Pawhushka Oil & Gas Co.,[101] it was a city that complained because a limitation lawfully imposed by it on the rates charged by a gas company was removed by an order of the state corporation commission permitting the raising of the rates. The commission acted under authority granted by the legislature. The state court decided against the city, and a writ of error to the United States Supreme Court was dismissed on the oft-declared principle that a city has no rights under the obligation-of-contracts clause in any governmental powers with which the state may from time to time endow it.

In two other cases rates fixed by commissions were unsuccessfully resisted in reliance on the obligation-of-contracts clause. Englewood v. Denver & S. P. Ry. Co.[102] held that a town ordinance granting a franchise and permitting certain fares was not a contract immune from the power of the state commission to regulate the charges. The facts are so concealed in the opinion that it is difficult to tell just what the case stands for. In Union Dry Goods Co. v. Georgia Public Service Corporation,[103] the plaintiff had to be told that it could not, by making a contract with an electric light company for certain rates for a term of five years, defeat the power of the state to authorize the service corporation to charge more. It chanced that the commission was vested with power before the making of the contract relied on, but this does not appear to have been regarded as important. Mr. Justice Clarke remarked rather tartly that the decisions which he cites "should suffice to satisfy the most skeptical or belated investigator that the right of private contract must yield to the exigencies of the public welfare when determined in an appropriate manner by the authority of the state."

In two cases writs of error were dismissed for want of jurisdiction because it did not appear that the state decisions complained of gave

[100] (1919) 249 U. S. 540, 39 Sup. Ct. 371.
[101] (1919) 250 U. S. 394, 39 Sup. Ct. 526.
[102] (1919) 248 U. S. 294, 39 Sup. Ct. 100. See 17 *Michigan Law Review* 429.
[103] (1919) 248 U. S. 372, 39 Sup. Ct. 117.

any effect to a law of the state subsequent to the alleged contract. United States Fidelity & Guaranty Co. v. Oklahoma[104] involved a state decision which held that a surety company which had guaranteed a bank deposit was not entitled to exoneration from the bank and to contribution from the state depositors' guaranty fund. The Supreme Court found that the state court had predicated the result on a line of state decisions which tended to support it and not on a state statute passed after the execution of the bond. The opinion of Mr. Justice McReynolds contents itself with referring to the leading state decision without presenting its doctrine or its reasoning, so that we are left without the necessary data to enable us to judge the merits of the contention denied. The state decision left undisturbed by Farson, Son & Co. v. Bird[105] had denied a mandamus against a county treasurer on the ground that the only remedy of the bondholder was against the county board of revenue. This was held to be a decision on a mere question of procedure and not to deny contract rights of the creditors, especially in view of the fact that a later decision of the state court had authorized mandamus proceedings against the board of revenue.

Another impecunious county was involved in Missouri & Arkansas Lumber & Mining Co. v. Greenwood District[106] which allowed a state statute providing that judgments on county indebtedness should not bear interest to be applied to judgments rendered before its enactment. It was not contended that a judgment was a contract, but it was urged that judgments which by their terms bore interest at a designated rate could not be changed by subsequent legislation consistently with due process of law. An earlier decision was sought to be distinguished on the ground that the judgment there involved did not specify the rate of interest, but the court answered that "the mere recital of a particular rate does not change the nature of the charge as a penalty or liquidated damages." The earlier decision had held that the allowance of interest on judgments was not a matter of contract but one of legislative discretion which could be altered from time to time as to any interest not then accrued. In the principal case it was noted that the warrants for which the judgment was rendered were non-interest bearing, and it was recognized that, if this had not been the case, "a different question would have been presented."

[104] (1919) 250 U. S. 111, 39 Sup. Ct. 399.
[105] (1919) 248 U. S. 268, 39 Sup. Ct. 111.
[106] (1919) 249 U. S. 170, 39 Sup. Ct. 202.

The only successful reliance on the obligation-of-contracts clause was in Central of Georgia Ry. Co. v. Wright[107] which found that an attempt to tax the lessees of a railroad on their leasehold interests violated the original contract in the charter of the lessor railroad prescribing the exclusive mode of taxation. It had previously been held that the property itself could not be taxed to the lessees, and the present tax was said to be an attempt to accomplish by a change of form what had already been held forbidden. In this case it was the constitution of the state which constituted the law impairing the obligation of the contract.

The cases remaining for consideration involve objections to congressional legislation which are predicated upon the due-process clause of the Fifth Amendment. Fink v. County Commissioners[108] allowed Indian lands which when allotted were declared nontaxable and inalienable for a term of years to be made alienable and taxable in the hands of an alienee. For all that appears the original exemption was regarded as contractual, though the question is not considered. The case is disposed of on the ground that "it invades no right of the Indian . . . . to make the alienation of the land a surrender of the exemption from taxation." While the opinion specifically left undecided the question "whether a grantee of an Indian could avail himself of the Indian's right, if he had any, to assert the unconstitutionality of an act of Congress," it expressed approval of the decision of the state court that the alienee who acquired the opportunity to purchase the land only through the removal of the prior restriction on alienation, cannot repudiate the conditions on which the restriction is removed. On the economics of the legislation so far as it affects the interests of the Indian, Mr. Justice McKenna observed: "It is an error to suppose that this takes anything of value from the Indian. We may here invoke the commonplace, for it is a commonplace to say that we only know the value of a thing by that which makes its worth. Under the restriction against the alienation the land had no worth but in its uses; the restriction removed, it had the added worth of exchangeability for other things—a power of sale was conferred. To say there was no value in that power is to contradict the examples and estimations of the world."

[107] (1919) 248 U. S. 525, 39 Sup. Ct. 181.
[108] (1919) 248 U. S. 399, 39 Sup. Ct. 128.

In Capital Trust Co. v. Calhoun[109] an attorney who had a contract with his client for a lien upon the amount which he should collect for him from the government objected because the congressional legislation making an appropriation for the payment of the claim restricted the amount which the attorney should receive from the proceeds to less than the percentage agreed by the client. The case arose in proceedings against the deceased client's administrator and it chanced that the only funds in his possession were those received from the government. The power of the government to restrict payment from those funds was sustained on the theory that legislation was necessary to the recovery of anything from the government and that the favor bestowed must be taken by all interested subject to the limitations contained in the grant. The court pointed out that it did not pass on the question whether the contract could be enforced against assets not received from the government.

IX. IMMUNITIES OF PERSONS CHARGED WITH CRIME

In three cases, convictions under the Espionage Act of 1917 were sustained notwithstanding the objection that, since the offense charged consisted solely of written or spoken utterances, the result was a violation of the First Amendment prohibiting Congress from making any law "abridging the freedom of speech or of the press." The defendants had been found guilty of attempts or conspiracies to obstruct recruiting. In no case was it proven that the obstruction has occurred. Mr. Justice Holmes implied that the First Amendment imposes restriction on punishment for the use of language as well as on the use of the censorship. In Schenck v. United States[110] he says: "We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. . . . . The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will

[109] (1919) 250 U. S. 208, 39 Sup. Ct. 486, 13 *American Political Science Review* 621.

[110] (1919) 249 U. S. 47, 39 Sup. Ct. 247. See Zechariah Chafee, Jr., "Freedom of Speech in War Time," 32 *Harvard Law Review* 932, and Thomas F. Carroll, "Freedom of Speech and of the Press in War Time," 17 *Michigan Law Review* 621, for discussions of all the Espionage Cases. Mr. Chafee's article contains an exhaustive bibliography on the subject of Freedom of speech.

bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war, many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right."

It is thus apparent that the practical effect of the free speech amendment depends upon the scrutiny which an appellate court casts at the relation between the evidence offered and the verdict of the jury. In Frohwerk v. United States[111] it was remarked that "we do not lose our right to condemn either measures or men because the country is at war" and it was said of the case before the court: "It does not appear that there was any special effort to reach men who were subject to the draft; and if the evidence should show that the defendant was a poor man, turning out copy for Gleeser, his employer, at less than a day laborer's pay, for Gleeser to use or reject as he saw fit, in a newspaper of small circulation, there would be a natural inclination to test every question of law to be found in the record very thoroughly before upholding the very severe penalty imposed." This certainly hints that the Supreme Court may hold as a matter of law that the likelihood of any harm ensuing from the objectionable publication is so slim that a conviction is unwarranted. But Mr. Justice Holmes goes on to say: "But we must take the case on the record as it is, and on that record it is impossible to say that it might not have been found that the circulation of the paper was in quarters where a little breath would be enough to kindle a flame and that the fact was known and relied upon by those who sent the paper out." This implies that the verdict of the jury will be set aside only where the court finds it impossible for a reasonable man to infer that harm might ensue from what was said, and considerably weakens the declaration in the Schenck case that the question is whether the words are so used as to create a clear and present danger of substantive evils.

The opinion in Debs v. United States[112] adds little to the previous discussion except to point out that expressions which, under all the circumstances, would probably obstruct recruiting, are not protected because "part of a general program and expressions of a general and conscientious belief." The three cases can be fully understood only in the light of all the utterances involved. Space forbids their enumera-

[111] (1919) 249 U. S. 204, 39 Sup. Ct. 249.
[112] (1919) 249 U. S. 211, 39 Sup. Ct. 252.

tion here, but there can be no doubt that all had pretty clearly implied nobility in any one who refused to acquiesce in the draft or contribute to the prosecution of the war. Further constitutional questions may be raised by convictions under the Espionage Act of 1918 which is broad enough in its terms to punish almost any cantankerous or grumbling remarks about the conduct of the war.

Among minor points involved in the Espionage Law Cases are that documentary evidence is not inadmissible because obtained on a search warrant which is valid so far as appears, that a single count in an indictment for conspiring to commit two offenses is not bad for duplicity when the conspiracy is the crime and is single, however diverse its objects, and that the fact that the offense charged might constitute treason does not prevent its punishment as something else or the fact that it is not treason render it immune from punishment.

That judges are limited by the Fifth Amendment in committing for contempt was laid down in Ex parte Hudgings[113] in which a commitment for supposed perjury was set aside as void for excess of power, since it did not appear that the supposed perjury had any obstructive effect on the course of justice or that the commitment was based on any other considerations than the mere fact of perjury. On the constitutional question Chief Justice White declared: "Existing within the limits of and sanctioned by the Constitution, the power to punish for contempt committed in the presence of the court is not controlled by the limitations of the Constitution as to modes of accusation and methods of trial generally safeguarding the rights of the citizen. This, however, expresses no purpose to exempt judicial authority from constitutional limitations, since its great and only purpose is to secure judicial authority from obstruction in the performance of its duties to the end that means appropriate for the preservation and enforcement of the Constitution may be secured."

It is not wholly clear that the decision in Blair v. United States[114] rested on constitutional grounds. Some Michigan persons were subpoenaed to testify before a federal grand jury in New York which was investigating an alleged violation of the Corrupt Practices Act in connection with verifying and filing in New York some reports with regard to a primary election in Michigan for nomination as United States senator. The witnesses came to New York but refused to answer questions on the grounds that the grand jury was without

[113] (1919) 249 U. S. 378, 39 Sup. Ct. 337. Mr. Justice Pitney dissents.

[114] (1919) 250 U. S. 273, 39 Sup. Ct. 468.

jurisdiction and that the Corrupt Practices Act was unconstitutional. They were committed for contempt, writs of habeas corpus were obtained and discharged and the complaints came to the Supreme Court. It was there held that the constitutionality of the Corrupt Practices Act was no concern of the defendants and would not be considered. It was further held that witnesses summoned before a grand jury cannot question the jurisdiction of the court or jury over the subject matter under investigation, nor urge objections of incompetency or irrelevancy to the questions asked. The duty to testify was declared to be a public duty "which every person within the jurisdiction of the government is bound to perform upon being properly summoned, and for the performance of which he is entitled to no further compensation than that which the statutes provide."

X. JURISDICTION AND PROCEDURE OF COURTS

THE EXTENT OF FEDERAL JUDICIAL POWER

Disputes involving the question whether a case arises under the Constitution of the United States have so far as seemed feasible been chronicled under the topics to which the substantive issue belonged. One vagabond remains for consideration. Petrie v. Nampa & Meridian Irrigation District[115] dismissed a writ of error from a state court because the Supreme Court found that the state court, even though it had passed adversely on a federal question, had also decided the case on an independent ground broad enough to sustain the judgment. This independent ground was that the cross-complaint under which the federal right was asserted was filed prematurely.

Two cases held that the suit did not arise under a law of the United States. Odell v. F. C. Farnsworth Co.[116] was found to be merely a suit for royalties under a contract and not one involving any construction of the patent laws. Matters v. Ryan[117] was a habeas corpus proceeding to secure custody of a child. The controlling question in the case was the maternity of the child. The allegation in the complaint that the pretended mother brought the child from Canada without complying with the immigration laws was found not to arise under those laws since the petitioner had no power to champion their enforcement.

[115] (1918) 248 U. S. 154, 39 Sup. Ct. 25.
[116] (1919) 250 U. S. 501, 39 Sup. Ct. 516.
[117] (1919) 249 U. S. 375, 39 Sup. Ct. 315.

Two cases were found not to arise under a treaty. The contention in Cordova v. Grant[118] was that the treaty between Mexico and the United States prohibited the courts from dealing with the title to disputed land until the boundary was established. The United States and Texas had for many years exercised jurisdiction over the tract in dispute. In sustaining the exercise of jurisdiction below, Mr. Justice Holmes declared that it "simply means that the Court finds the Government in fact asserting its authority over the territory and will follow its lead," adding: "It does not matter to such a decision that the Government recognizes that a foreign power is disputing its right and that it is making efforts to settle the dispute. . . . . Jurisdiction is power and matter of fact. The United States has that power and the Courts may exercise their portion of it unless prohibited in some constitutional way." In holding that the treaty was not involved in the dispute, the court is following the established doctrine that whatever the treaty may mean the court must follow the interpretation of the political authorities. The issue arose before the Supreme Court because of the contention that the presence of a question under the treaty made the decision of the district court subject to direct review in the Supreme Court. Jurisdiction below was obtained by reason of diversity of citizenship.

In Compania General De Tabacos v. Alhambra Cigar & Cigarette Mfg. Co.[119] the right to appeal to the Supreme Court from the supreme court of the Philippine Islands depended upon whether the case involved the treaty with Spain continuing in force rights of property secured by patent and copyright prior to the cession of the islands. The court below had held that the trade name involved was a geographical or descriptive name incapable of registration under Philippine statutes or the law as it existed under the Spanish régime. In holding that no right secured by the treaty was involved, Mr. Justice Day declared: "Certainly the treaty, in providing that property rights of this class should be respected, did not intend to prevent the consideration by the courts of the nature and extent of the rights granted, or prohibit the application of laws for the enforcement and regulation of such property rights when not in derogation of the treaty." The grounds of the decision below were said to be "entirely compatible with continued respect for the trade-mark and trade-name rights granted by the Spanish sovereignty."

[118] (1919) 248 U. S. 413, 39 Sup. Ct. 138.
[119] (1919) 249 U. S. 72, 39 Sup. Ct. 224.

Questions as to the extent and exercise of admiralty jurisdiction arose in three cases. In The Scow 6 S.,[120] which was a libel *in rem* for penalties against a scow for illegal dumping in New York Harbor, the determining question was one of statutory construction, but in the course of the opinion Mr. Justice Pitney observed that "there is no difficulty, on constitutional or other grounds, about assessing an unliquidated fine in the admiralty." Union Fish Co. v. Erickson[121] held that a contract for service on a vessel is maritime in nature and that its enforcement in admiralty is not controlled by the state statute of frauds. North Pacific S. S. Co. v. Hall Brothers Marine Ry. & Shipbuilding Co.[122] declared that the contract for repairs of a wrecked vessel was maritime in nature, even though the repairs were to be done largely on land under the direction of the shipowner and at designated rates of compensation for the various services rendered and the materials furnished. Contentions that the repairs were in substance new construction and that the contract was in effect a lease of the shipbuilders yards and facilities were held to be unfounded.

REQUISITES OF JURISDICTION OVER DEFENDANTS

The attempt of Kentucky to gain jurisdiction over nonresident individuals doing business within the state through an agent by service of process on the agent was frustrated by the Supreme Court in Flexner v. Farson[123] which held that Illinois was not required to recognize a Kentucky judgment founded solely upon service on such agent who at the time of service had ceased to be agent. In deciding the case Mr. Justice Holmes said: "It is argued that the pleas tacitly admit that Washington Flexner was agent of the firms at the time of the transaction sued upon in Kentucky, and the Kentucky statute is construed as purporting to make him agent to receive service in suits arising out of the business done in that State. On this construction it is said that the defendants by doing business in the State consented to be bound by the service prescribed. The analogy of suits against

[120] (1919) 250 U. S. 269, 39 Sup. Ct. 452.

[121] (1919) 248 U. S. 308, 39 Sup. Ct. 112. See 17 *Michigan Law Review* 591, and 28 *Yale Law Journal* 500.

[122] (1919) 249 U. S. 119, 39 Sup. Ct. 221. See 32 *Harvard Law Review* 853, and 28 *Yale Law Journal* 697.

[123] (1919) 248 U. S. 289, 39 Sup. Ct. 97. See Austin W. Scott, "Jurisdiction Over Non-residents Doing Business Within a State," 32 *Harvard Law Review* 871. See also 3 *Minnesota Law Review* 277, and 28 *Yale Law Journal* 512.

insurance companies based upon such service is invoked. . . . . But the consent that is said to be implied in such cases is a mere fiction, founded upon the accepted doctrine that the States could exclude foreign corporations altogether, and therefore could establish this obligation as a condition to letting them in. . . . . The State had no power to exclude the defendants and on that ground without going farther the Supreme Court of Illinois rightly held that the analogy failed, and that the Kentucky judgment was void. If the Kentucky statute purports to have the effect attributed to it, it cannot have that effect in the present case." This seems sufficiently enigmatic to enable the Supreme Court to declare later that it means that a personal judgment can never be rendered against a nonresident individual without personal service within the state, or that it means only that service on an ex-agent is insufficient.

PROCEDURAL REQUIREMENTS

Mr. Berkman, the anarchist, deposited with the clerk of the district court a sum of money in lieu of bail. After his conviction he desired the cash returned, but the clerk retained one per cent by virtue of a statute fixing such a fee "for receiving, keeping, and paying out money, in pursuance of any statute or order of court." Mr. Berkman thought that this deprived him of property without due process, took his property for public use without just compensation, and deprived him of the privileges and immunities of a citizen of the United States. The Supreme Court thought otherwise and so held in Berkman v. United States.[124] Mr. Justice McReynolds for the majority declared that the suggested constitutional questions were wholly wanting in merit and too unsubstantial even to raise an issue to give the Supreme Court jurisdiction on the writ of error. Justices Holmes and Brandeis dissented but without giving their reasons. We do not know, therefore, whether they merely thought the contentions of sufficient merit to be considered or whether they went further and thought them worthy of acceptation. If the latter, it does not seem courteous of the majority to declare that the matter is "too clear for serious discussion."

[124] (1919) 250 U. S. 114, 39 Sup. Ct. 411.

FAITH AND CREDIT TO PROCEEDINGS OF SISTER STATES

The full faith and credit clause was unsuccessfully adduced by two insurance companies which relied on the recent tendency of the Supreme Court to prevent diverse holdings in different states as to the powers of a corporation[125] and to nullify attempts on the part of a state to use its power over acts within its borders to control acts without.[126] The statute objected to in American Fire Insurance Co. v. King Lumber & Mfg. Co.[127] made the person who solicits insurance and procures applications the agent of the insurer notwithstanding anything in the policy to the contrary. But the court found that the statute did not attempt to invade another state and exercise control there but "stays strictly at home in this record and regulates the insurance company when it comes to the state to do business with the citizens of the state and their property."

Hartford Life Insurance Co. v. Johnson[128] went off on the ground that the constitutional question had not been seasonably raised in the state court. The determining question in a suit in Missouri against a Connecticut insurance company was whether an assessment on the policy holder was validly levied. The Missouri court held that it was not, and refused to give any effect to a Connecticut judgment of contrary tenor rendered between the trial and the hearing on appeal of the Missouri suit. It was conceded that the Connecticut judgment if seasonably pleaded in the Missouri court must defeat the Missouri action, but the Supreme Court held that the Missouri decision followed the established practice in the courts of that state and was not rendered in a spirit of evasion for the purpose of defeating the claim of federal right. It followed, therefore, that the federal question was rightly refused consideration below and so was not before the Supreme Court.

The company also objected that the Missouri court failed to give full faith and credit to the Connecticut charter. On this point Mr. Justice Clarke declared: "Even if this charter, which was granted by a resolution of the Assembly of Connecticut, be regarded as a public act or record of that state within the scope of the constitutional provision (article 4, section 1), which is not decided, nevertheless since

[125] See cases reviewed in 12 *American Political Science Review* 662-64, and 13 *American Political Science Review* 246-47.

[126] See 13 *American Political Science Review* 247.

[127] (1919) 250 U. S. 2, 39 Sup. Ct. 431, 13 *American Political Science Review* 627.

[128] (1919) 249 U. S. 490, 39 Sup. Ct. 336.

no statute of Connecticut or decision of any court of that state was pleaded or introduced in evidence in this case, giving a construction to the provisions of the charter which the Missouri courts, treating as valid, interpreted, the exercise by those courts of an independent judgment in placing a construction upon it cannot present a federal question under the full faith and credit clause of the Constitution." Thus the hint thrown out in earlier cases that sister states must follow the home state of a corporation in interpreting its charter, even when the matter has not been specifically adjudicated in the home state in a proceeding to which the litigants in the sister state are parties or privies, still remains to be confirmed by explicit decision.

XI. ADMINISTRATIVE POWER AND PROCEDURE

The power vested in the secretary of war to fix the limits within which houses of ill fame within the neighborhood of army posts should be suppressed was upheld in McKinley v. United States,[129] as one of the "mere details" of the legislation.

The question whether an administrative order complained of was a "law of the state" so as to bring a dispute concerning it within the jurisdiction of the federal courts arose in two cases. Lake Erie & W. R. Co. v. Public Utilities Commission[130] held that an order to a railroad to restore a side track was legislative in character and so to be regarded as a state law. But Standard Computing Scale Co. v. Farrell[131] found that instructions issued by the state superintendent of weights and measures with respect to the proper equipment of scales were not a law, but mere suggestions, since the local officials to whom the so-called instructions were issued were not subordinates of the state superintendent nor subject to his control.

Three cases involved the question whether the determinations of administrative officials were final and conclusive. United States v. Laughlin[132] depended upon the construction of a statute providing that "in all cases where it shall appear to the satisfaction of the Secretary of the Interior" that a person has made payments under the public land laws in excess of the lawful amount, a refund shall be made. The secretary contended that it rested in his uncontrolled discretion

[129] (1919) 249 U. S. 397, 39 Sup. Ct. 324, 13 *American Political Science Review* 620.
[130] (1919) 249 U. S. 422, 39 Sup. Ct. 345, 13 *American Political Science Review* 630.
[131] (1919) 249 U. S. 571, 39 Sup. Ct. 380.
[132] (1919) 249 U. S. 440, 39 Sup. Ct. 340.

to direct repayment, but the court held that it was the intent of Congress that he should have exclusive jurisdiction only to determine disputed questions of fact. Since his decision in the case before the court had been rested wholly on a question of law, the Supreme Court held it reviewable. Mr. Justice Pitney remarked that under the construction urged by the secretary the legislative power would in effect be delegated to him, but did not say whether this would be unconstitutional.[133]

Houston v. St. Louis Independent Packing Co.[134] and Brougham v. Blanton Mfg. Co.[135] sustained determinations of the secretary of agriculture that certain trade names were false and deceptive under the Meat Inspection Act, under the principle that "the conclusion of the head of an executive department on such a question will not be reviewed by the courts, where it is fairly arrived at and with substantial evidence to support it." Both cases reversed decrees of the circuit court of appeals granting relief to the complainants. The opinions of the Supreme Court considered the evidence sufficiently to reach the conclusion that the determination of the secretary was not arbitrary.

[133] In Lane v. Darlington, (1919) 249 U. S. 331, 39 Sup. Ct. 299, the Supreme Court set aside an injunction awarded by the court below in favor of an owner of land bordering on government land forbidding a resurvey of government land on the direction of the secretary of the interior. The opinion of the Supreme Court said that, as the whole proceeding was merely an effort by the United States to determine the boundary of its own land, "we know of no warrant for the notion that the power is exhausted by a single exercise of it." It was recognized that "the case is different when the act of the secretary is directed to a third person, as, for instance, the approval of a map of the location of a railroad over public lands, where the approval operates as a grant."

[134] (1919) 249 U. S. 479, 39 Sup. Ct. 332.

[135] (1919) 249 U. S. 495, 39 Sup. Ct. 363.